IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY.

No. 71-1607

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vs.

THE BOEING COMPANY AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

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INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber has appeared in this Court as *amicus curiae* in a broad spectrum of labor relations matters substantially affecting the legitimate and vital interests of its members. Examples of such cases in which the Chamber has most recently participated include *N. L. R. B.* v. *Granite State Joint Board*, ... U. S. ....., 34 L. Ed. 2d 422 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970).

The issues presented here are particularly important to the Chamber's members, many of whom are engaged in commerce and, together with their employees, are subject to the provisions of the National Labor Relations Act. In particular, the question raised in No. 71-1417—whether this Court's decision in *Granite State Joint Board, supra*, can be avoided by an asserted "limitation" in the union constitution against accepting employment in an establishment where a strike exists—poses serious concern to the balance struck by this Court in *Granite State Joint Board* between union disciplinary powers and employee rights to resign union membership and refrain from strike action. Similarly, the issue in No. 71-1607—whether the "reasonable-

* The instant brief is filed with the written consent of all parties in both 71-1417 and 71-1607, pursuant to the rules of this Court.

ness" of union fines can and should be determined by the National Labor Relations Board within the operational framework of Section 8(b)(1)(A)—is particularly significant to articulation of the accommodation of conflicting economic interests effected by this Court in *Granite State Joint Board, Scofield* v. *N. L. R. B.*, 394 U. S. 423 (1969) and *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967). Both issues encompass the same underlying area of inquiry—the extent to which unions can discipline and enforce such discipline against their members.

Effectuation of the Act's purpose and policy by striking a proper balance between an individual's freedom of choice, a union's interest in solidarity and adherence and an employer's need to be free of the burden of coerced strike conduct required the Chamber's participation in *Granite State Joint Board*. This same necessity impels the Chamber's submission of its views to the Court here. For the same reasons as most recently expressed in *Granite State Joint Board*, the practical importance of these matters to the Chamber's members and the right of their employees to refrain from engaging in union activities as guaranteed in Section 7 of the Act, require and underline the Chamber's position before this Court.

SUMMARY OF ARGUMENT.

A. Enactment of Section 8(b)(1)(A) of the Act and amendment of Section 7 to guarantee employees "the right to refrain from any or all (union) activities", in the conceptual context of the "contract-constitution" rationale applicable to the relationship between union and member, evidenced a Congressional purpose to prevent unions from coercing employees to engage in strike or other such union-directed conduct against their will. In allowing unions to expel those who disregard union-imposed requirements, such as by refusal to strike, Congress accommodated the

union's "institutional" need to achieve solidarity in the use of the strike weapon with the employee's individual right to refrain from strike activity without coercion. This Court's decision in *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), permitting a union to levy "reasonable" fines on its members, carefully extended the legislative balance of rights created by the Act recognizing at the same time that "a few well-placed, sincere penalties can mark the danger lines which cautious members will not dare to cross" (Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1050 (1951)). Any further extension of union disciplinary power—through grant of the right to fine non-members upon an "implied" contractual agreement in a union constitutional rule as sought by the petitioner in No. 71-1417 or disregard of the rule of "good faith" and "reasonableness" as demonstrated by petitioner in No. 71-1607—would not only judicially repeal the guarantees of Section 7 but undercut the very "contract-constitution" principles upon which this Court has explicated its decisions in the area of union-member relationships (e.g., *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 at 182).

B. Granting unions the power to impose unlimited fines on members who resign or to so fine members for conduct subsequent to resignation on the basis of an implied obligation which survives resignation not only creates an imbalance upon the Section 7 right not to strike but also eviscerates this Court's decisions in *Scofield* v. *N. L. R. B.*, and *N. L. R. B.* v. *Granite State Joint Board*. In *Scofield*, this Court's accommodation of union discipline with individual freedom turned upon the following lines between permissible and impermissible union action against members: ". . . Section 8(b)(1) leaves a union free to enforce a properly adopted rule which . . . is *reasonably enforced* against union members who are *free to leave the union and escape the rule*. . . ." (emphasis added) In *Granite State*

Joint Board, this Court reaffirmed the principle of *Scofield* and firmly established the precept that "when a member lawfully resigns from the union, its *power* over him *ends*" (emphasis added). Petitioner in No. 71-1417 advances no constitutional or bylaw provision defining or limiting the circumstances under which a member may resign—the only issue left open by this Court in *Granite State Joint Board,* but seeks to avoid both *Scofield* and *Granite State Joint Board* through the extension of union power over a resigned member and/or post-resignation conduct where such power is "necessary" to enforcement of a "just and reasonable" union rule against accepting employment in a struck place of employment. Contrary to the assertion of petitioner in No. 71-1417 this matter does not present the question reserved in *Granite State Joint Board* (Pet. Brief, p. 57) but instead constitutes the effort of petitioner to emasculate *Scofield* and *Granite State Joint Board.* To permit unions to extend power over non-members by the exercise of disciplinary action against post-resignation conduct contrary to a union rule against "accepting employment" (compulsory strike activity) disregards a basis of free institutions —the right of the individual to join or to resign from associations as he sees fit, subject only to *financial obligations* due and owing (at the time of resignation) *Communications Workers* v. *N. L. R. B.*, 215 F. 2d 835, 838 (2d Cir. 1954)).

C. Satisfaction of the legitimate institutional needs of unions neither requires nor supports the extension of disciplinary power over those who decide to resign membership by the enforcement of a "union obligation" implied from the member-union contract,—the constitution. Without such an extension of power in derogation of the rights to join and resign, the substantial weapons unions already possess to expel and fine are sufficient for "enforcement" of the majority's will. To afford unions the further power to compel obedience to union-directed conduct notwithstanding

resignation would permit not just an effective strike weapon but the means by which to coerce compliance with union strike objectives. Neither the terms of the statute, its legislative history, sound policy nor the principles applicable and necessary to free institutions allow such a result.

D. Advancement and reliance on such concepts as estoppel and "implied obligations" as analytical devices to determine the statutory rights of strikers and foreclose the associational rights of union members to resign are neither appropriate nor logical. Such concepts presuppose conduct knowingly and voluntarily undertaken notwithstanding the plain facts that union membership and the duties and obligations imposed by the union's constitution and bylaws are not voluntarily assumed in any meaningful sense. Thus, an employee desirous of a voice in the collective bargaining process conducted by a union as "exclusive bargaining representative" has no choice but to join —the terms on which the employee obtains membership are not "bargainable" and the employee has no option as to which or how many constitutional and bylaw obligations, unilaterally imposed by the union as an institution, shall be assumed. It is, therefore, unrealistic to contend that any employee upon assuming union membership undertakes an unqualifiable and non-terminable "union obligation" to strike for an unlimited time notwithstanding resignation. Such "survival" of union power over an employee after termination of the union-member relationship can neither be "implied" from union rule nor derived from the "good faith" and "reasonableness" standards inherent in the "contract-constitution" doctrine.

E. The salutary principle that any contractual relationship encompasses and rests upon the factors of "good faith" and "reasonableness" by implication of fact and operation of law (1 Corbin, *Contract,* 276-355), transposed into the area of union-member relationships through the "contract-constitution" doctrine (*Local 1912, I. A. M.* v.

United States Potash Co., 270 F. 2d 496, 498 (10th Cir. 1959)), cert. denied, 363 U. S. 845 (1959), derives from this Court's decisions in *Allis-Chalmers, Scofield* and most recently *Granite State Joint Board.* In each of these cases, as in the decision of the court below and the parallel decision of the Ninth Circuit Court of Appeals in *Morton Salt Co.* v. *N. L. R. B.*, ... F. 2d ....., 82 LRRM 2066 (1972), accommodation of the union's institutional need to exercise disciplinary power for the achievement of "union objectives" with the Section 7 rights of individuals to act without restraint or coercion turns upon the very factors of "good faith" and "reasonableness". Where the imposition of discipline is taken for causes not "reasonably" related to the union's institutional requirements, the restraint or coercion flowing from its imposition is violative of 8(b)(1)(A) (*e.g., N. L. R. B.* v. *Industrial Union of Marine and Shipbuilding Workers,* 39 U. S. 418 (1968)). Where, as here, the disciplinary action is not "reasonable" to or in keeping with the "good faith" requirements of the associational relationship between union and member, the coercion inherent in "unreasonable" discipline similarly violates 8(b)(1)(A).

F. Granting unions the right to fine non-members for refusing to strike would adversely affect Congress' intent to promote free collective bargaining in which ". . . the results of the contest [are left] to the bargaining strengths of the parties." *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). Inherent in this concept is the premise that the nature of the harm which a strike,—a statutorily-sanctioned form of economic warfare,—imposes on the parties should affect their bargaining posture and the ultimate terms upon which they resolve their dispute. To permit unions to fine non-members, thus in effect preventing them from responding to the economic pressures which their strike set in motion, constitutes an artificial restraint on the process of collective bargaining.

ARGUMENT.

Introduction: A Framework for Analysis.

In the course of "elucidating litigation" over the past several years dealing with the accommodation of a union's institutional requirements to exercise disciplinary power with the statutory right of employees to enjoy Section 7 rights without "restraint" or "coercion", this Court has articulated the basic elements necessary to achieving the proper balance of conflicting interests. *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967) and *Scofield* v. *N. L. R. B.*, 394 U. S. 423 (1969) mark out three (3) of the fundamental areas of concern under Section 8(b)(1)(A):

(i) the union obligation sought to be enforced must be one properly related to the union as an institution;

(ii) "enforcement" by court-collectible fine must be "reasonable"—that is, the equivalent of the union's proviso-guaranteed right to expel from membership through affording the member the choice to escape discipline by resignation;

(iii) where fines are imposed, the amount must be "reasonable" under the circumstances.

Both *N. L. R. B.* v. *Industrial Union of Marine and Shipbuilding Workers*, and *N. L. R. B.* v. *Granite State Joint Board*, further refine and delineate these three (3) areas of inquiry: the former concluded that insulation of the union from the proper scrutiny of unfair labor practice charges is not an objective properly related to or "reasonably required" for the unions' existence as an institution; the latter determined that the union's power to discipline for a "reasonable" objective, being co-extensive with its ability to expel, terminates upon the member's exercise of that alternative by resignation; both decisions, implicitly and expressly, demanded that where discipline

is channeled into fine imposition, the fine must be "reasonable" to withstand 8(b)(1)(A) violation.

Each of these cases involved a union's leveling of fines against members and non-members (after resignation) and required a structured accommodation of unions' institutional needs to compel obedience with the rights of employees to take action disapproved by the union, as guaranteed by Section 7 of the Act. In effecting this balance of conflicting statutory rights, giving due consideration to Congress' purpose to promote free collective bargaining determinative by bargaining strengths alone (*H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970)), the Court has stressed the "contract" basis of the union-member relationship (*N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 at 182). The implication of this contractual basis describes a fourth area of concern in the articulation of the boundaries set by Section 8(b)(1)(A)—that is:

> (iv) whether the disciplinary action imposed is within or outside the standards of "good faith" and "reasonableness" inherent in the contract-constitution.

Where, as in the instant case, the discipline imposed is asserted to be outside the standards of "good faith" and "reasonableness", adjudication by the administrative body charged with labor relations expertise is required under Section 8(b)(1)(A). In requiring the National Labor Relations Board to assess and determine "reasonableness" as a part of its administration of Section 8(b)(1)(A), the court below has given effect to the content of Section 7 as applied to dissenting employees through the parameters of 8(b)(1)(A) as drawn by this Court. This result satisfies the will of Congress, the design and structure of the Act and the practical needs of employees in their associational relationships with their union and their fellow employee-union members.

A. Section 8(b)(1)(A) Proscribes the Imposition of Fines Upon Employees Who Resign and Demands the Determination of the "Reasonableness" of Fines Levied on Members.

The legislative history of Sections 7 and 8(b)(1)(A), and the course of judicial construction with respect to the interaction of those sections, illustrate the propriety of the decision of the court below. Congressional concern with the right of employees to a reasoned choice with respect to strike participation was evidenced in the enactment of Section 7 providing that "employees shall have the right to self-organization, to form, join or assist labor organizations . . . and . . . to refrain from any or all of such activities." The purpose behind incorporation of the "right to refrain" language in the 1947 amendments to the Act *vis a vis* Section 8(b)(1)(A) was directed to:

> ". . . make the prohibition contained in Section 8(b)(1) apply to coercive acts of unions against employees who do not wish to join or did not care to participate in a strike or picket line."[1]

Congressional objectives to free employees from coercion to engage in strike activity are demonstrated by the inclusion of such individual rights in Section 7, their protection in Section 8(b)(1)(A) and the legislative debates which preceded enactment. In structuring the interplay of these provisions of the Act, legislative discussion centered upon the individual worker's right to make effective individual choices with regard to union-directed activities and the correlative need to be free from union coercion to act contrary to such individual choice.[2] At the same time,

1. 93 Cong. Rec. 6859, II Legislative History of the Labor Management Relations Act of 1947, 1623 (hereinafter cited Leg. Hist.).

2. This purpose is evidenced in the statements of Senator Taft throughout the course of the legislative debates. For example:

> "If there is anything clear in the development of labor union history in the past ten years, it is that more and more labor

recognition of the institutional requirements of unions to maintain the effectiveness of strike activity[3] and implicit acknowledgment of the coercive impact of fines in assuring obedience to union directives[4] were parts of the context within which these legislative deliberations occurred. This recognition took into account the fact that provisions defining punishable conduct were considered to be "part of the contract between member and union."[5]

Accommodation of the structure of Sections 7 and 8(b)(1)(A), given this legislative history and taking into account the law applicable to free institutions and associations, is reflected in the decisions of this Court. The power of a union to impose reasonable fines upon its members to compel obedience to union directives and objectives as set out in *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967) and *Scofield* v. *N. L. R. B.*, 394 U. S. 423 (1969) is counterbalanced by the right of the member, under necessary standards of associational law, to resign from the union and escape the rule whose enforcement is sought by fine (*Communications Workers* v. *N. L. R. B.*, 215 F.

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union employees have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders." (93 Cong. Rec. 4023, II Leg. Hist. 1028.)

3. Thus, Senator Taft explained.

"I can see nothing in this pending measure which . . . would outlaw strikes . . . It would not outlaw anybody striking who wanted to strike . . . all it would do would be to outlaw such restraint and coercion as would present people from going to work if they wished to go to work." (93 Cong. Rec. 4436, II Leg. Hist. 1207.)

4. It was, and remains, axiomatic that "a fine is by nature coercive" (*Local 138, Operative Engineers*, 148 NLRB 679, 682). The distinctive nature of a fine, as a sum "fixed in terrorem", was well settled in the common law at the time of the legislative debates. See, e.g., Oleck, *Dameces* Sections 6, 8; 36 CJS, *Fines*, Section 1.

5. *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 at 182 (1967).

2d 835 (2d Cir. 1954)). Once resignation is effective, power to compel obedience to associational rule ends, the attempt to enforce such obedience, necessarily falling outside the confines of internal union structure, constitutes statutorily proscribed coercion. This is the lesson of *N. L. R. B.* v. *Granite State Joint Board.* Such post-resignation power to force conformance to union directive cannot, as petitioner seeks in No. 71-1417, be created by an implied promise made while a member to refrain from accepting employment with any struck employer. Thus, this Court has made clear the fact that only financial obligations existing at the time of resignation can be enforced after resignation —no "obligation" of fealty to union directive survives membership termination. In this connection the Court stated in *N. L. R. B.* v. *Granite State Joint Board*, at 426:

> "We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated."

Concommitant to the "associational-contract" principles underlying the issue of union power over those who resign are the implied covenants of good faith, fair dealing and reasonableness "which inhere in every contract" (*Local 1912, I. A. M.* v. *United States Potash Co.*, 270 F. 2d 496, 498 (10th Cir. 1959), cert. denied, 363 U. S. 845 (1959)). The law normally applicable to free institutions,—which includes the right to resign free of prospective adherence to association rule,—marks the line between permissible and impermissible union action under Section 8(b)(1)(A) and thus delineates the ambit of Section 8(b)(1)(A)'s operation with respect to union action against members. This delineation explains this Court's express and implicit requirements in *Allis-Chalmers, Scofield* and *Granite State Joint Board* that 8(b)(1)(A) is not called into play where

the fine is "reasonable". Where, however, the fine is excessive or unreasonable, the ordinary contract principles applicable to free institutions cannot insulate union action against members from the operation of Section 8(b)(1)(A) without also repudiating the structure of the Act and the historic matrix surrounding enactment of Sections 7 and 8(b)(1)(A). Thus, the concepts of "fairness" and "reasonableness" are inherent to the constitution-contract between union and member.[6] When those concepts are transgressed by the imposition of an excessive fine, for example, the disciplinary power is thus no longer "internal" to the union within the boundaries of the constitution-contract but "external" and within the standards of Section 8(b)(1)(A).

> "The effects of unionism are undoubtedly to democratize industrial management in the sense that autocratic powers of employers are restricted by rules and regulations negotiated with representatives of the workers . . . If labor organizations also exercise autocratic powers over their members, their workers may merely be substituting dictatorial rule of union officials for the arbitrary authority of the employer or his managers."[7]

Petitioner in No. 71-1417 seeks to create a power over employees who resign through the medium of an obligation to obey union directives or rules implied upon the concepts of "fairness" and "good faith" inherent in the contract-constitution. Such a contention not only would

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6. The dependence of "realistic" interpretations of union constitutions upon the standards of good faith and reasonableness is stressed by Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049 (1151) who notes at 1056:

> "Membership in a union contemplates a continuing relationship with changing obligations as the union legislates in a monthly meeting or in annual conventions. It creates a complex cluster of rights and duties expressed in a constitution. In short, membership is a special relationship."

7. W. Leiserason, *American Trade Union Democracy*, 54 (1959).

vitiate this Court's decision in *Granite State Joint Board* but also would destroy the fundamental principles of law applicable to free institutions upon which *Granite State Joint Board, Scofield* and *Allis-Chalmers* have been established. At the same time, petitioner in No. 71-1607, by disclaiming the Congressionally-placed authority to determine the "reasonableness" of union fines, would have this Court circumscribe the intended operation of Section 8(b)(1)(A) from its reach of matters outside the structure of the union-member (contract) relationship to the narrow area of improper union rules. This Court's continued emphasis upon the "reasonableness" of the fine amount in *Allis-Chalmers, Scofield* and *Granite State Joint Board* illustrates the misdirection of petitioner's effort in No. 71-1607 and the necessity that the National Labor Relations Board determine under 8(b)(1)(A) whether the fine exceeds the limits of the contract-constitution on the same bases normal to any free institution. The necessity of such a determination is even more evident in view of the increasing recognition that unions, having been clothed by Congress with extraordinary powers in a field of vital public importance, must be restricted by a corresponding duty to their members.[8] The decision of the Court below properly accomplishes such a restriction in accord with the purposes and policy of the Act and the decisions of this Court.

B. Union Discipline of Members Who Resign on the Basis of an Implied Promise of Perpetual Union Fealty Is Neither "Reasonable" Nor Consistent with This Court's Decision in Granite State Joint Board.

Prior to its decision in *Granite State Joint Board*, this Court emphasized the predominance of Section 7 in the statutory scheme by empowering the N. L. R. B. to enjoin

8. *Steele* v. *Louisville & N. R. R.*, 323 U. S. 192, 202-203 (1944); and see, Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, at 819-820 (1960).

state action which impinges upon rights granted in the Act *N. L. R. B.* v. *Nash-Finch Co.*, U. S. 138 (1971). Consistent with this emphasis, and consonant with the lines drawn in *Scofield* v. *N. L. R. B.*, this Court held in *Granite State Joint Board* that "when a member lawfully resigns from the union, its power over him ends" (34 L. Ed. at 425). An essential aspect of this Court's decision in *Granite State Joint Board* was the subsidiary conclusion that union members possess the same *associational rights* as applicable to any other free institution,—the right to join or resign as the member sees fit subject only to any financial obligations then accrued to the group. Although petitioner in No. 71-1417 argued in the court below that its members could only resign "by death", petitioner has changed its contentions before this Court in apparent response to the Court's *Granite State Joint Board* decision. Petitioner now maintains that regardless of the fact of resignation or the effectiveness of such resignation, the power of discipline survives termination of the associational relationship and can be exercised on the basis of an implied "good faith" promise to abide a union rule against employment at any establishment on strike (Brief for Petitioner in No. 71-1417, pp. 57-90).

Contrary to petitioner's contention that this question of "survival" of the power of discipline presents the question reserved in *Granite State Joint Board* (Brief for Petitioner, p. 57) the facts show the issue to be nothing other than an attempt to relitigate and dismember the holding in *Granite State Joint Board*. Thus, the union constitutional provision in question here does not "define or limit the circumstances under which a member could resign" and, in fact, the relevant contract-constitution contained no provision whatever concerning "resignation". Absent such a provision with respect to "the right to resign", members can resign at any time (*N. L. R. B.* v. *Mechanical and Allied Production Workers, Local 444*, 427 F. 2d 883 (1st Cir.

1970); *Communicatioins Workers* v. *N. L. R. B.*, 215 F. 2d 835 (2d Cir. 1954)).

Extension of union disciplinary power over members who resign, via a theory of survivorship of the "contractual" obligation to refrain from working for a struck employer, may not be implied from the requirements of "good faith" and "reasonableness" inherent in the contract-constitution; rather, such an extension is diametrically opposed to the rationale and intendment of the Act and this Court's decisions. In *Allis-Chalmers*, this Court emphasized that coercion through *reasonable* fines was tolerated, within the confines of contract-constitution, by virtue of a subsisting union-member relationship and, therefore, did not fall under the scrutiny of 8(b)(1)(A). However, in *Scofield*, the Court clarified the import of *Allis-Chalmers* and its meaning in achieving a balance between individual freedom to resist union-directed activities and the union's institutional need to compel adherence to its objectives: "reasonable" enforcement was sanctioned only where "union members . . . are free to leave the union to escape the rule" (394 U. S. 423, at 430). The import of *Scofield*, —that union discipline cannot reach an employee who resigns from membership before committing the act for which the union seeks to exercise disciplinary power,—is made clear in *Granite State Joint Board*. Thus, "when a member lawfully resigns from the union, its power over him ends" (34 L. Ed. at 425); acceptance of union constitutional provisions or bylaw restrictions upon acquiring membership, no more than acquiescene in a strike vote, cannot subsequently form a basis for post-resignation discipline. The court below so held as should this Court in conformance with its concise holding in *Granite State Joint Board* that,

> ". . . [W]here, as here, there are no restraints on the resignation of members, we conclude that the vitality

of Sec. 7 requires that the member be free to refrain in November (after resignation) from the actions (union rule) he endorsed in May (upon joining the union) and that his Sec. 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime". (34 L. Ed. 2d at 426).

C. The Fact That an Employee Accepted a Union Rule Against Employment in a Struck Establishment Upon Obtaining Union Membership Is Not a Valid Reason for Limiting His Section 7 Rights After Resignation and Such "Survival" of "Union Obligation" Is Not Necessary to the Union's Institutional Needs.

As the progress of this Court's decisions make clear, the union's right to discipline its members outside the ambit of Section 8(b)(1)(A) turns upon the contract between member and union (*N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. at 182). Where, as here, the "contract-constitution" contains no limitations on the right to resign, there is no warrant for reading into it an implied obligation to remain a member to the extent of being subject to union disciplinary control to enforce obligations allegedly assumed upon obtaining membership (*N. L. R. B.* v. *Granite State Joint Board*). Whether such an implied obligation is urged to derive from participation in a strike vote, as was the case in *Granite State Joint Board*, or from acceptance of a union constitutional provision against working for a struck employer as now urged here, the same policy considerations expressed in Section 7 reinforce ordinary contract principles against implying a contractual obligation to engage in specific union activities after the termination of membership. Thus, the court below properly concluded that "it is generally recognized that courts will not usually imply offenses" and that "extremely important national policy militates against the imposition of such an implied obligation" (Pet. App., p. 16a-17a).

In balancing the interest of the union in preserving solidarity during a strike against the interest of the individual employee who no longer wishes to remain a member of or support the union, the court below properly concluded that Section 7 reflects a focal principle of national labor policy weighing the balance in favor of the individual. The court below, after emphasizing that Section 7 "expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act" (Pet. App., p. 17a), concludes that the "voluntariness" characteristic of union membership carried with it the fact that the member was free to leave the association when its policies were no longer acceptable. Upon leaving, the member does not carry with him a perpetual obligation to obey a union's constitutional directives and is subject only to any "financial" obligations "due and owing" the association at the time membership terminates *Communications Workers* v. *N. L. R. B., supra.*

Although an employee may "accept" a union rule upon acquiring membership and becoming subject to the "contract-constitution", subsequent events may lead the employee to exercise his individual choice and disregard the rule. A reasonable accommodation of the competing interests involved, particularly where the rule precludes working during the course of a strike for any struck employer, allows the employee to change his mind without the risk of disciplinary action, provided the employee is willing to resign from the union before abandoning the rule. It would be incompatible with this reasoned accommodation to interpret the union's constitution and bylaws as imposing, by implications of "good faith" and "reasonableness", a surviving obligation of union fealty not to work during an authorized strike under any circumstances which may arise or change.

The power of unions to fine "members" together with the right to expel them from membership provide suf-

ficient bases upon which to compel obedience to union objectives. To further extend this power by creating a base for disciplinary action against members who accept the burdens of resignation by implying the "survival" of union obligations is neither necessary nor sensible to the "contract-constitution" rationale upon which the union's disciplinary powers are found to operate outside Section 8(b)(1)(A). To afford unions coercive disciplinary power to compel obedience not freely given by subjecting non-members to "continuing" obligations of union obedience after resignation is contrary to the institutional interests of unions as such and destructive of the purpose and policy of the Act. Thus,

> "Balancing the interests involved, it is likely that whereas genuine pro-strike morale among the bulk of the membership is a factor crucial to the union's ability to call a successful strike, the union has not argued and shown a serious need to substitute for that morale the power to coerce recalcitrants; absent clear need, the NLRB's bias against coercion and in favor of persuasion as the technique of union cohesion seems dispositive. Against the union's interest in an artificial solidarity must be weighed the member's Section 7 interest in freedom from restraint. . ."[9]

D. Creation of a Duty to Obey Union-Directed Objectives After Resignation on the Basis of Estoppel or Implied Obligations Is Neither Logical Nor Consistent with the Act.

The court below properly determined that employees who exercised their individual choice to resign membership effectively escaped the rule against working in a struck establishment following the date of resignation. No workable reason for upsetting this determination, which is fully consistent with this Court's decisions in *Allis-Chalmers,*

9. Comment, 80 Harv. L. Rev. 683, 687 (1967).

Scofield and *Granite State Joint Board,* is advanced by petitioner in No. 71-1417. On the contrary, and in direct disregard of the described principles of associational law applicable to free institutions, petitioner contends that although the individual may resign he is estopped to disregard the rule against working at a struck establishment on the basis of an obligation implied from "good faith" and "reasonableness" inherent in the "contract-constitution". This theory for avoiding the Court's decision in *Granite State Joint Board* is unsound as a matter of contract law and federal labor policy.

No member accepting membership and thereby the "contract-constitution" knowingly accepted a post-resignation effect of any constitutional provision or union rule. While a member's acceptance of a union rule may estop the member to disregard the rule while he remains a member and the union-member contract remains intact, such acceptance cannot reasonably be viewed as a commitment to remain a member or to be obedient to the rule after resignation. For example, while a member may agree to be subject to assessments during the period of his union membership, such an agreement neither commits him to remaining a member nor to remaining subject to assessments after resignation. Similarly, while a member may agree to a union rule against working in a struck establishment, it does not follow that he intends thereby also to commit himself to remain a union member for the duration of any strike or to remain subject to the rule after resignation of his union membership. To imply such post-resignation susceptibility to union disciplinary authority wreaks havoc with the "contract-constitution" principles upon which union immunity from 8(b)(1)(A) is premised and eviscerates the careful balancing of Section 7 rights in which this Court has engaged, as noted above.

To argue that a member's acceptance of union constitutional provisions or bylaws commits the individual to par-

ticipate in union activities after resignation overlooks the fact that a union's right to compel participation in union activities, in derogation of the language in Section 7, is contingent upon the existence of the contract of membership. To permit a union to discipline a member on the basis of a union rule, after the individual's contract of membership as terminated, destroys the individual's Section 7 right to refrain from engaging in union activity by "escaping the rule through resignation". In sum, the court below properly concluded that under the circumstances present here, the NLRB arrived at a fair balance of legitimate union and member interests by deciding that, upon resignation, the union's disciplinary power over the member ends. Such a determination constitutes a proper and necessary exercise of the Board's "function of striking that balance to effectuate national policy (which) is often a difficult and delicate responsibility" (*N. L. R. B.* v. *Truck Drivers Union*, 353 U. S. 87, 96).

E. Effectuation of the Act's Policies Demands the Board Exercise Its Function to Balance Section 7 Rights by Determining the Reasonableness of Fines Under the Purposes of Section 8(b)(1)(A).

As the legislative history reflects and as this Court has observed, Sections 7 and 8(b)(1)(A) were enacted in the context of the concept that the union-member relationship subsisted upon and was measured by a "contract-constitution" (*N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. at 182). The principles of contract law applicable to free institutions and particularly voluntary associations have been predominant in this Court's accommodation of individual Section 7 rights with the institutional needs of unions to compel obedience to union rules. Thus, the right and effect of resignation and the necessity of "reasonable enforcement" form a common thread throughout the balanc-

ing process which underlies *Scofield, Industrial Union of Marine and Shipbuilding Workers* and now *Granite State Joint Board.* Implicit in this decisional history and now presented for determination here are the facts that "good faith", "reasonableness" and "fair play" are factors inherent in any contractual relationship (1 Corbin, *Contracts,* 276-355; *Local 1912, I. A. M.* v. *United States Potash Co., supra.*) Where union conduct exceeds or is in derogation of that "good faith", "reasonableness" or "fair play" imbedded "in every contract of association" (*Polin* v. *Kaplan,* 257 N. Y. 277, 177 N. E. 833, 834 (1931)), the contract-constitution does not insulate it from the operation of 8(b)(1)(A) and cannot logically do so. Thus, where the exercise of disciplinary power, although ostensibly within the framework of internal union relationships, is not "reasonably related" to the union as an institution, the imposition of a fine is violative of 8(b)(1)(A), as the Court found in *N. L. R. B.* v. *Industrial Union of Marine and Shipbuilding Workers.* Similarly, where the disciplinary power takes the form of a fine which is not "reasonable" in amount, such transgression of the "fair play" and "good faith" standards of the "contract-constitution" is not and cannot be insulated from the reach of 8(b)(1)(A); on the contrary, once union disciplinary power in the form of excessive fines goes outside the area of "reasonableness" circumscribed by the contract-constitution, that contractual basis of exemption from 8(b)(1)(A) is no longer logically available and the Section, which bars coercion of members is applicable. This construction of Section 8(b)(1)(A) in the reasoned accommodation of union disciplinary power with individual Section 7 rights is evident in the Court's continued insistence that only "reasonable fines" and "reasonable enforcement" upon members are excluded from the operation of Section 8(b)(1)(A), and constitutes the bedrock upon which the court below properly concluded that the

NLRB, in striking that delicate balance in national policy, must determine the reasonableness of fines.

As the court below and the Ninth Circuit in *Morton Salt Co.* v. *N. L. R. B.*, ... F. 2d ....., 82 LRRM 2066 (1972) correctly observed, where the existence of an unfair labor practice is in issue and particularly since the "reasonableness" of a fine draws the line between "contract-constitution" immunity and 8(b)(1)(A) operation, the Board can and must make that determination. Drawing upon an area of experience in the application of Section 8(b)(5), (e.g., *Longshoremen, I. L. A., Local 1419*, 186 NLRB No. 94), the Board can and must develop affirmative standards of "reasonableness" to provide the individual and the union with uniform guidance concerning the interplay of the contract-constitution and the Labor Act in the same way such standards were developed by the Board in jurisdictional dispute matters after this Court made clear that "the Board need not disclaim the power given it for lack of standards" (*N. L. R. B.* v. *Radio and Television Broadcast Engineers Union*, 364 U. S. 573, at 583 (1961)).[10] Nor would the development and application of such standards bring federal and state interests into conflict since the state courts, in strictly construing union disciplinary action against unions and to afford the individual every pos-

10. It is no bar to the adoption of the principles urged herein that the Board would be required to determine the "reasonableness" of unions' conduct,—an admittedly imprecise criterion. The expertise of the Board is regularly called upon to draw difficult lines and even to define what is "reasonable." In *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), this Court directed the Board to determine whether unions' use of private property should be required because of the absence of "reasonable" alternative means of communication. In *Quality Manufacturing Co.*, 195 NLRB No. 42, the Board itself adopted a rule under which the existence of employees' rights depended upon whether they had a "reasonable" basis to fear discipline. Indeed, in Section 8(b)(5) of the Act Congress created on unfair labor practice whose gravamen is a union's imposition of an "excessive" —hence "unreasonable"—fee.

sible leeway to the exercise of free choice,[11] look to procedural and substantive elements not involved in the determination of the "reasonableness" of a fine. Further, and even in connection with the determination of whether a fine is excessive, the state courts assess the fine against the needs of the union and state labor law policy,[12] and do not deal with the delicate balance of Section 7 rights against the institutional needs of the union within the statutory matrix of Section 8(b)(1)(A) and the standards of the "contract-constitution" doctrine. Only the Board can make these latter accommodations and such balancing by an expert agency is fully consistent with the congressional and judicial scheme of administration of labor laws and policies.

Congress' purpose to name one central agency for the adjudication of the intricate issues of labor relations matters[13] is evidenced in this Court's insistence that these "delicate balances" be struck by the Board. Insistence upon the Board's "primary responsibility" to guide the development of national labor policy,[14] reflected in the preemption doctrine,[15] is equally applicable where, as here,

11. Christensen *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N. Y. U. L. Rev. 1 (1968).

12. E.g., *Jost* v. *Communications Workers of America*, 91 Cal. Rptr. 722; *Walsh* v. *Communications Workers of America*, 259 Md. 608, 27 A. 2d 148; *Communications Workers of America* v. *Maloney*, 486 P. 2d 1275 (Ore.); *Local 248, U. A. W.* v. *Natzke*, 36 Wis. 2d 237, 153 N. W. 2d 602; see also, *United Glass Workers* v. *Seitz*, 65 Wash. 2d 640, 399 P. 2d 74; *Retail Clerks Local 629* v. *Christiansen*, 67 Wash. 2d 29, 406 P. 2d 327.

13. *Amalgamated Utility Workers* v. *Consolidated Edison*, 309 U. S. 261 (1940); *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (1938).

14. *N. L. R. B.* v. *Raytheon Company*, 398 U. S. 25, 28 (1970).

15. *International Longshoremen's Local 1416, AFL-CIO* v. *Ariadne Shipping Company*, 397 U. S. 195, 200 (1970); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959).

the "power and duty of primary decision lies with the Board".[16] Once that duty is properly assumed within the framework of development of standards of "reasonableness" marking out the boundaries of Section 8(b)(1)(A)'s applicability to fines, "diversities and conflicts likely to result from a variety of local procedures and attitudes"[17] toward unions as institutions will be avoided. Development of such standards will, therefore, benefit the union as an institution as much as the member himself in the reasoned exercise of his Section 7 rights within the framework of the "contract-constitution". The court below so held.

F. The Extension of Unions' Disciplinary Power to Non-Members Is Contrary to Congress' Intent to Foster Free Collective Bargaining and to Principles of Sound Policy.

To grant unions the right to discipline non-members would violate the Federal scheme whereby the result of economic warfare between the parties should depend upon the will of the parties to continue the conflict. The logic of a strike involves a test of the combatants' resolve to withstand the harm to which such economic warfare necessarily and intentionally subjects the parties; the employer's loss of present and anticipated income is contrasted with employees' loss of salary and fear of replacement. It is at least arguable that *Allis-Chalmers* has already effected an unwarranted dislocation of this play of economic forces in compelling union members, through fear of fine as well as expulsion, to continue a strike beyond their desire and ability to withstand its consequences. To permit unions to exercise the same control over those who renounced their membership in order to avoid the continuing harm imposed

16. *Garner* v. *Teamsters Union*, 347 U. S. 485, 489-491 (1953).

17. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959).

by this statutorily recognized form of warfare constitutes clear intervention on one side of the dispute.

The bargaining equality in which Congress sought to leave the parties to a labor dispute has been recognized by this Court which has held that ". . . the results of the contest [are left] to the bargaining strengths of the parties". *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). And in *Granite State Joint Board* itself, the Court recognized that it is entirely appropriate that the effects of the parties' knowingly undertaken economic struggle should affect the results of that struggle. Thus, Justice Douglas acknowledged, in speaking for the Court, that

> "Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the spectre of hardship to his family; the case with which the employer replaces the strikers may make the strike seem less provident."

And the Act's legislative history supports the view that artificial hindrances to the unfettered play of relative economic strengths inhibits free collective bargaining. According to Senator Taft:

> "Our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels he can make an unreasonable demand and get away with it." (I Leg. Hist. 1007).

The effect of granting to unions the right to fine nonmembers would be to promote situations in which unions can make and secure such demands, since it practically prevents the affected employees from ceasing their strike activity, no matter the economic consequences which their strike produced. Such a result would not merely permit unions the exercise of such disciplinary power as to render their strikes effective, but would grant the power virtually to guarantee their success.

That result, apart from its inherent inequity, frustrates the purpose of the Act in that it interferes with the free play of economic forces. It inhibits collective bargaining by placing a restraint on the ability of adverse economic consequences to produce a settlement.[18]

> "Collective bargaining works because the parties know that if they didn't move towards an agreement they will get hurt. A strike to be effective must hurt both sides. It is the strike and fear of a strike that causes compromise and agreements . . ."[19]

According to this Court's decision in *H. K. Porter*, collective bargaining is a system of economic tension based on the parties' respective strength. Artificial supports to one side or the other,—as by governmental subsidies to management, welfare payments to strikers, or the fines involved here, produce results which are unrelated to the parties' strength, their will or resolve, and are thus inconsistent with the legislative design.

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18. In the *Granite State* case the play of economic forces led a number of employees to return to work, a factor whose impact on the ultimate terms on which the parties would resolve their dispute was both natural and consistent with the idea that the effect of the strike's harm—on one party or the other—should affect their bargaining posture. The communicated threat of fines which surely inhibited other employees in that case from resigning union membership and returning to work created an artificial bargaining posture inconsistent with free collective bargaining.

19. Affidavit of Dr. Herbert Northrup, Director of the Industrial Research Unit of the Wharton School of Finance and Commerce, p. 41 (presented to the court in *Francis, et al.*, v. *Davidson, etc., et al.* (unreported, D. Md., 1972), and referred to in the Jurisdictional Statement in this Court in *U. S. Chamber of Commerce* v. *Francis, et al.* (No. 71-1554).

CONCLUSION.

For the reasons stated above, together with those additional arguments and authorities raised by the Board in No. 71-1417 and by the Boeing Company in No. 71-1607, it is urged that the Court affirm the decision below.

Respectfully submitted,

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